BLOOMVILLE CORPORATION SDN. BHD.

v.

KAPITAL RAYA SDN. BHD.

HIGH COURT MALAYA, SHAH ALAM
DATO' RANITA HUSSEIN JC
[CIVIL SUIT NO. 22-18-94]
22 JULY 1994

PRACTICE & PROCEDURE: Order 18 r. 19 RHC - Application to strike out plaintiff's action to recover deposit paid to defendant pursuant to a letter of offer to purchase defendant's land - Whether plaintiff had an arguable case.

CONTRACT: Plaintiff offering to purchase defendant's land - Letter of offer headed "Subject to contract" - Letter of offer accepted by defendant - Defendant introducing new term in letter of acceptance - Whether there was a concluded agreement between the parties - Construction of documents relied on.

The plaintiff's claim was for the return of a deposit paid to the defendant upon the defendant's acceptance of the plaintiff's offer to purchase its land. The letter of offer was headed "Subject to contract" and contained a clause that the deposit would be forfeit in the event the plaintiff failed or refused to execute the formal sale and purchase agreement within 7 days of all the terms of the sale and purchase agreement being agreed upon and within 30 days from the date of acceptance of the letter of offer. The time limit was extended at the request of the plaintiff but the terms of the formal agreement were still not agreed upon by the deadline whereupon the defendant forfeited the deposit.

The plaintiff challenged the defendant's right to forfeit its deposit on the basis that the letter of offer was a conditional offer and contended that if there was no agreement on the terms then time would not begin to run. The plaintiff also referred to the exchange of letters between the parties as evidence that the parties were still negotiating and further claimed that the defendant's letter of acceptance was not unequivocal as it introduced, *inter alia*, the condition that the premises would be rented out to the plaintiff if the conditions precedent in the offer were not met.

The issue was whether the letter of offer by the plaintiff and the acceptance by the defendant constituted a concluded agreement between the parties.

Held:
The question of whether or not there was a concluded agreement between the parties depended on the construction of the documents relied on in each particular case. In the present case the introduction by the defendant of a new term amounted to a counter-offer but it was unclear from the affidavit evidence whether there was an acceptance of the counter-offer. In the statement of claim the plaintiff mentioned a tenancy agreement in the context of an oral agreement between the parties whereby the plaintiff was allowed to go into the property and let it out after the deposit was paid which was certainly of a different complexion from the one referred to in the defendant's letter of acceptance. In the circumstances, the plaintiff had made out an arguable case.

[Defendant's application dismissed].

Cases referred to:
Karuppiah v. Petaling Garden Co. Sdn. Bhd. [1972] 1 MLJ 173 ***(dist)***
Low Kar Yit & Ors. v. Mohamed Isa & Anor. [1963] 29 MLJ 165 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 7
Rules of the High Court 1980, O. 18 r. 19

For the applicant - Steven Thiru; M/s. Shook Lin & Bok
For the respondent - S.Y. Ng; M/s. Raja, Darryl & Loh

JUDGMENT

Ranita Hussein JC:

The defendant filed a summons in chambers to strike out the plaintiff's writ of summons and statement of claim under O. 18 r. 19, High Court Rules, 1980. The plaintiff's claim was for the return of a deposit amounting to RM180,000 paid by it to the defendant, upon the defendant accepting the plaintiff's offer to purchase its land, Lot 529, Jalan SS 13/1K, Subang Jaya at a price of RM9 million.

It is necessary to reproduce in substantial form the plaintiff's letter of offer to better appreciate the submissions of Counsels for the parties. It is headed 'subject to contract' and reads as follows:

x x x

2. We are instructed by our clients to inform you that our clients offer to your clients ("the vendors") to purchase the abovecaptioned property based on the following basic terms and conditions:

(I)	**Property:**	All that parcel/piece of building known as Lot 529, Jalan SS 13/1K, Subang Jaya measuring approximately 2,140.58 square metres erected on the Land held under G.M. 73 in the Mukim of Damansara, District of Petaling and State of Selangor ("the property").
(II)	**Purchase Price:**	Ringgit Malaysia Nine Million (RM9,000,000) only.
(III)	**Payment of Earnest Deposit:**	Two per centum (2.00%) of the purchase price amounting to Ringgit Malaysia One Hundred and Eighty Thousand (RM180,000) only as earnest money paid in MUI Bank Cheque (Cheque No. 669783) made in your favour for you to hold as stakeholders and acknowledged receipt by your clients as deposit and part payment towards the account of the purchase price.
(IV)	**Failure to sign:**	Your clients may forfeit the Earnest Deposit in the event that our client fails or refuse to execute the formal sale and purchase agreement within (7) days after all the terms of the formal sale and purchase agreement have been agreed upon; by the parties thereto within thirty (30) days from the date of the acceptance of this letter of offer.

The Earnest Deposit shall be refunded to us immediately upon demand in the event that:

(a) Your clients fail or refuse to execute the formal sale and purchase agreement within (7) days after all the terms of the formal sale & purchase agreement have been agreed upon by the parties thereto within thirty (30) days from the date of acceptance of this letter of offer.

(b) any of the following preconditions are not satisfied:

(i) The receipt of the written evidence by us from your clients showing both the premium and quit rent for the conversion of the abovecaptioned property has been fully paid by your clients; and

(ii) The category of land use in the title deed of the abovecaptioned property has been duly endorsed as industrial use by the relevant authorities, whereupon your clients shall be entitled to sell the abovecaptioned property to any party your clients deem fit free from our claims, rights and interest.

(V)	**Time to be of the essence:**	Time wherever mentioned shall be of the essence.
(VI)	**Your clients to act reasonably in negotiating the terms of the formal sale and purchase agreement:**	Your clients shall not introduce any unreasonable provisions, conditions, terms, undertakings or covenants in the formal sale and purchase agreement which shall not be agreeable to our client.

3. We forward herewith our MUI Bank Cheque (Cheque No. 669783) made in your favour for the sum of Ringgit Malaysia One Hundred and Eighty Thousand (RM180,000) only being the Earnest Deposit for you to hold as stakeholders and your clients have acknowledged receipt of the same and please confirm your client's acceptance of our client's offer to purchase based on the above mentioned basic terms and conditions.

4. Kindly acknowledge receipt by signing and returning the duplicate of this letter to us.

x x x

The defendant avers that the last date for agreeing on the terms of the sale and purchase agreement was 3 May 1993 being 30 days after the defendant's acceptance of the offer on 3 April 1993. It is the defendant's contention that in the event of the failure of the parties to agree on the terms of the agreement, the deposit would become forfeited to the defendant.

The time limit for the agreement was extended to 18 May 1993 at the request of the plaintiff. When the terms of the formal agreement were still not agreed upon by that date, the defendant proceeded to forfeit the deposit. The plaintiff then sued for the return of the deposit.

The question at issue is whether or not the letter of offer by the plaintiff and the acceptance thereof by the defendant constitutes a concluded agreement between the parties.

The defendant relied on the case of *Karuppiah v. Petaling Garden Co. Sdn. Bhd.* [1972] 1 MLJ 173, where it was held that the application for the purchase of a house signed by the plaintiff constituted a completed contract. In that event the right of the defendant to the forfeiture of the deposit paid by the plaintiff was confirmed. It is relevant to note that in that case the conditions of sale stipulated in the application envisaged the execution of formal agreements within a stipulated period. There was however, included a condition stating that:

> The deposit cannot be withdrawn or refunded and shall be forfeited to the company on the applicant's failure to proceed with the proposed purchase.

There was, therefore, very clear and definite language excluding the right to a refund of the deposit if the sale was aborted.

In this case, however, the plaintiff challenges the defendant's right to forfeit its deposit on the argument that the letter of offer was headed with the words "subject to contract" and was therefore a conditional offer. The plaintiff further argues that according to the offer, the parties had 30 days to agree to the terms of the agreement and upon the terms being agreed to, the agreement was to be executed within 7 days of the agreement on the terms. The plaintiff postulates that if there were no agreement on the terms then time would not begin to run. In support of this the plaintiff referred to clause (VI) of the letter of offer as portending the negotiation of a sale and purchase agreement.

The plaintiff also referred to the busy exchange of letters by the parties as evidencing the fact that the parties were still in negotiations and there was no concluded agreement.

The plaintiff relied on the case of *Low Kar Yit & Ors. v. Mohamed Isa & Anor.* [1963] 29 MLJ 165. In that case the option to purchase given to the plaintiff was stated to be subject to "a formal contract to be drawn up and agreed upon by yourself and ourselves". It was held that in view of the aforesaid condition, 'the exercise of the option amounted to nothing more than an agreement to enter into an agreement' and as such 'there was no concluded contract between the parties'.

In the final analysis, the question of whether there was a concluded agreement between the parties depends on the construction of the document relied on in each particular case. The defendant urges the Court to apply the *contra proferentum* rule in this case so that the ambiguity in the words of the offer letter should be construed in favour of the defendant. The course of action appears persuasive but for the fact that I am unconvinced that there is ambiguity in the relevant document.

In any event, the plaintiff argues that even if the letter of offer was held to be unconditional, the defendant's letter of acceptance was not unequivocal. The defendant had in its letter of acceptance introduced, *inter alia*, the condition that the premises would be rented out to the plaintiff if the conditions precedent in the offer were not met. This, argued the plaintiff, was a new term on which the defendant caveated its acceptance. As such, it vitiates the defendant's argument that there was a concluded agreement between the parties.

In this connection reference may again be made to *Low Kar Yit's* case where Gill J. in considering s. 7 of the Contracts (Malay States) Ordinance 1950 (now s. 7 Contracts Act 1950) stated at page 67 as follows:

> It is plain that a contract comes into existence where there has been an unqualified acceptance of a definite and unequivocal offer, the corollary of which is that there can be no binding contract either if a conditional offer is followed by an unqualified acceptance or if an unqualified offer is followed by a conditional acceptance; in either of these two cases no legally binding contract will arise unless and until the stipulated condition is fulfilled.

In the present case, the introduction by the defendant of a new term amounted to a counter offer. It is unclear from the affidavit evidence whether there was an acceptance of the counter offer. Indeed in the statement of claim the plaintiff mentions a tenancy agreement in the context of an oral agreement between the parties whereby the plaintiff was allowed to go into the property and let it out after the deposit was paid. This agreement is certainly of a different complexion from the one referred to in the defendant's letter of acceptance.

In the circumstances, I find that the plaintiff has made out an arguable case and as such, the defendant's application to strike out the claim must fail.

The application is dismissed with costs.